The Legal Perspective

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The early focus of litigation against health care providers arising from the acquired immunodeficiency syndrome (AIDS) epidemic involved the transmission of human immunodeficiency virus (HIV) through blood transfusions. Current testing procedures should diminish the number of these lawsuits, but other AIDS-related lawsuits will not diminish. Since the case of transmission from an HIV-infected dentist to six of his patients, the focus of litigation is shifting to the potential for transmission from the health care worker to the patient. There does not seem to be much scientific question that Kimberly Bergalis and five other patients contracted HIV from a Florida dentist, although the mode of transmission remains a mystery.

After this discovery, the Centers for Disease Control and Prevention (CDC) studied HIV test results in 15,795 patients who were treated by 32 HIV-infected health care workers. No seropositive results in those patients could be traced to the provider.

Nonetheless, as a result of public and scientific concern about the potential transmission of HIV, the CDC published recommendations intended to prevent such transmission.[1] The CDC has concluded that, despite universal infection-control precautions, certain invasive procedures have been implicated in the transmission of HIV and hepatitis B virus (HBV) to patients. The CDC described the invasive procedures that may put patients at risk as "exposure-prone"—for example, certain oral, cardiothoracic, colorectal, and obstetric/gynecologic procedures.

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CDC Recommendations

Exposure-prone Invasive Procedures

The CDC originally made the following recommendations for preventing transmission of HIV to patients during exposure-prone invasive procedures:

One, all health care workers should adhere to universal precautions. Workers who have exudative lesions or weeping dermatitis should refrain from direct patient care and from handling patient-care equipment or devices used in performing invasive procedures. All health care workers should comply with current guidelines for disinfection and sterilization of reusable devices used in invasive procedures.

Two, HIV-infected individuals should not be restricted from practicing invasive procedures, provided those procedures are not identified as exposure-prone and providers comply with universal precautions and recommendations for sterilization/disinfection.

Three, exposure-prone procedures should be identified by the appropriate medical, surgical, or dental organizations and institutions at which the procedures are performed. According to the CDC:

> Characteristics of exposure-prone procedures include digital palpation of a needle tip in a body cavity or the simultaneous presence of the health care worker's fingers and a needle or other sharp instrument or object in a poorly visualized or highly confined anatomic site. Performance of exposure-prone procedures presents a recognized risk of percutaneous injury to the health care worker, and, if such an injury occurs, the worker's blood is likely to contact the patient's body cavity, subcutaneous tissues, and/or mucous membranes.

Four, providers who perform exposure-prone procedures should know their HIV status.

Five, HIV-positive providers should not perform exposure-

prone procedures unless an expert review panel has advised them that they may continue to perform the procedures. A worker may be permitted to perform invasive procedures pursuant to the expert panel's advice only if the prospective patients are first notified of the provider's seropositivity.

Mandatory Testing

The CDC did not recommend mandatory testing, noting that the current assessment of risk does not support the diversion of resources required to implement mandatory testing programs. However, the agency noted that compliance with CDC recommendations could be increased through education, training, and appropriate confidentiality safeguards.

Modifying Medical Practice

The CDC said that where health care workers modify their medical practice, they should be provided opportunities to continue appropriate patient care. Career counseling and job retraining are encouraged.

Notification of Patients and Follow-up Studies

The CDC said that the public health benefits of notifying patients who have had exposure-prone procedures performed by HIV-infected health care workers should be considered on a case-by-case basis. Specific risks, confidentiality issues, and available resources should be considered. Follow-up studies are necessary to determine more precisely the risk of transmission during exposure-prone procedures. Decisions regarding notification and follow-up studies should be made in consultation with state and local public health officials.

History of the CDC Recommendations

In December 1991, the CDC submitted to strong opposition from health care professionals and abandoned its plan to list exposure-prone invasive procedures that should not be performed by HIV-infected workers. Later, the CDC considered retracting

its recommendations altogether but ultimately decided that the intent of Congress in passing Public Law No. 102-141 required specific guidelines, such as those issued as part of its original recommendations.

According to William Roper, MD, CDC director, the agency continues to rely on its July 1991 guidelines, with one clarification: it has eliminated the recommendation that a single list of exposure-prone procedures be developed. Instead, the CDC concluded that it will allow state health departments to decide on a case-by-case basis whether HIV-positive workers pose a risk to their patients. Because policy making has been delegated to the state health departments, it is important that providers become familiar with applicable state laws or regulations. States vary in their approach, as the divergent policies adopted by New York and Texas illustrate.

The New York State Department of Health has stated its intention of protecting the confidentiality of infected health care workers and allowing them to continue treating patients in most cases. The proposed rules require a formal course in infection-control techniques. Any testing would be voluntary, and a review panel would assess whether an infected worker's continued practice poses a significant risk to patients and should be restricted. There is no requirement that any patients of an infected health care worker be advised of that worker's HIV status.

Under Texas law, health care workers who are infected with HIV may not perform exposure-prone procedures, as defined by the law, unless certain requirements are met. These requirements include having an expert review panel approve the procedure and having the workers notify prospective patients of their HIV status and obtain their consent. Other significant provisions in the Texas law require the adoption of CDC universal precautions, job retraining for infected workers whose practice must be modified, and development of a list of exposure-prone procedures. All HIV-infected workers with exudative lesions and weeping dermatitis must refrain from direct patient care and from handling patient-care equipment.

Although the CDC recommendations specifically state that "mandatory testing of health care workers for HIV antibody . . . is not recommended," they nonetheless establish a standard that appears to obligate a health care entity to establish policies enforcing the guidelines. Courts will look to the CDC standards to determine whether a health care entity may be held directly liable in negligence based on (*a*) negligent failure to establish appropriate policies, or (*b*) negligent selection or retention of HIV-infected employees or medical staff members. Health care providers are trapped between federal and state antidiscrimination laws that protect HIV-infected workers as handicapped individuals and the tort system that likely will hold them liable for failure to test their infected providers.

Adhering to Infection-control Policies

The Fifth Circuit Court of Appeals upheld a Louisiana hospital's discharge of a health care worker for violating hospital policy by refusing to submit the results of his HIV antibody test.[2] The health care worker was a homosexual who had been exposed to HIV during his eight-year relationship with a hospital patient who had AIDS.

The court found that the hospital "reasonably suspected" this employee (a licensed vocational nurse) of having an infectious disease for which special precautions might be required, because some of the plaintiff's duties were invasive procedures that presented opportunities for HIV transmission. The plaintiff sued the hospital as a result of his termination, alleging violation of his civil rights under various federal and Louisiana constitutional and statutory provisions.

The court of appeals held that:

(*a*) the health care worker was not discriminated against in violation of the federal Rehabilitation Act because he was terminated for failure to comply with hospital policy, not a perceived handicap;

(*b*) the hospital's infection-control policy, which required employ-

ees to report exposure to infectious diseases and undergo testing, was reasonably applied to the plaintiff;

(*c*) the hospital had a reasonable belief that the plaintiff was not "otherwise qualified" for employment, because he would not allow the hospital to conduct the necessary inquiry;

(*d*) the discharge did not violate the health care worker's equal protection rights under the Fourteenth Amendment, because the hospital's infection-control policies were rationally related to a legitimate interest; and

(*e*) the worker did not have a reasonable expectation of privacy regarding his HIV antibody test results; hence, his privacy claim under the Fourth Amendment did not apply.

The plaintiff alleged that he was discriminated against on the basis of a perceived handicap under section 504 of the Rehabilitation Act of 1973. The court assumed that seropositivity to HIV antibodies is an impairment protected under section 504 and that hospital officials treated the worker as if he had such an impairment. In essence, the plaintiff prevented the hospital from knowing whether he had a handicap for which federal law arguably required reasonable accommodations. The court agreed with the district court that the plaintiff was terminated for failure to comply with hospital policy, not solely because of a perception that he was infected with HIV.

Furthermore, with regard to the plaintiff's Fourteenth Amendment claims, the court reasoned that, even if some heightened scrutiny were required regarding classifications involving handicapped persons, there was a reasonable medical basis for suspecting that the provider had been exposed to HIV and for requiring that he submit the results of his HIV antibody test. This created a compelling and substantial interest for the hospital in enforcing its infection-control policies. Finally, the court found that the plaintiff did not have a reasonable expectation of privacy regarding his test result. Moreover, the hospital's strong interest in maintaining a safe workplace through infection control outweighed the limited intrusion on privacy.

The court distinguished this from another case,[3] stating:

> The facts in Glover are materially different, because the testing at issue there was much broader than that here, where only such employees as Leckelt, who were reasonably suspected of having been exposed to such infectious diseases as HIV, were subject to testing (test result reporting, in Leckelt's situation). This is a case of particularized, reasonable suspicion as to a specific individual; Glover is not. 909 F.2d at 833 n.23.

This case supports the right of hospitals to make reasonable inquiries and to enforce infection-control policies involving health care workers who have AIDS or are HIV-positive. Of course, any termination of an employee with a disease that is a perceived handicap will have serious legal implications, and legal counsel should be consulted.

In a North Carolina case,[4] the hospital suspended a physician from the medical staff based partly on his failure to comply with the hospital's HIV-related infectious–disease–control policies. The physician failed to inform medical personnel of a patient he knew to have HIV, and this failure caused nurses to be exposed to the blood and body fluids of the patient in the course of delivering the patient's baby. The court held that the physician was bound by the hospital's policy of identifying patients "as being potentially infectious" and that, therefore, the hospital's action in disciplining the physician for his failure to comply with the policy was not a wrongful, arbitrary, or capricious act.

The Fifth Circuit Court of Appeals recently held[5] that a hospital may reassign a surgical assistant who is HIV-positive without violating the Rehabilitation Act of 1973. The court's decision in *Bradley v. Univ. of Texas M.D. Anderson Cancer Center* supports the argument that a hospital may reassign an HIV-infected health care worker in the surgical field even if the risk of transmission to a patient is remote.

In 1991, Bill Bradley, the plaintiff, revealed to the *Houston Chronicle* that he was HIV-positive. Soon thereafter, the hospital reassigned him to a position of procurement assistant in the

purchasing department. Bradley sued the hospital, claiming that his reassignment violated the Rehabilitation Act of 1973 and constituted retaliation against him, in violation of the First Amendment, for speaking to the *Chronicle.* The district court granted summary judgment for the hospital on Bradley's claims and dismissed Bradley's pending state law claims.

On appeal, the Fifth Circuit defined the issue under the Rehabilitation Act of 1973 as whether Bradley was "otherwise qualified" to continue in his employment as a surgical technician despite his HIV status. The court explained that all parties to the lawsuit recognized that the entrance of infected blood into a patient's body could transmit HIV but disagreed about the probability that the virus could be transmitted from the plaintiff to a patient. The court found that the risk of such transmission was not so low as to nullify the catastrophic consequences of an accident. This fact alone was sufficient to make a surgical technician not "otherwise qualified" for the position of surgical assistant pursuant to the Rehabilitation Act.

The court found that the hospital could not accommodate Bradley without redefining the essential role of a surgical assistant and that such redefinition would exceed "reasonable accommodation" as required by the Rehabilitation Act. Furthermore, the court found that because no reasonable accommodation could be made, Bradley had no right to be reassigned to a job involving patient contact. Under his employer's policies, however, the court ruled that Bradley could not be denied reasonably available alternative employment opportunities. The Rehabilitation Act now requires covered agencies to reassign an individual with a handicap to a position at or near the individual's current grade, unless undue hardship can be shown.‡[2]

After examining Bradley's First Amendment claim, the court found that Bradley had not shown that his speech was a motivating factor and that his HIV-positive status gave the hospital grounds to reassign him. The fact that he informed the hospital of his status in a newspaper article did not change the hospital's rights in this situation.

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‡ 29 C.F.R. § 1614.203(g)(1993).

Removing an HIV-infected Staff Member

Although the CDC has recommended that HIV-infected health care workers submit to an expert review panel to determine the types of procedures, if any, they can perform, health care institutions face a legal dilemma in determining a course of action. Because HIV and AIDS are handicaps under the Americans with Disabilities Act (ADA), antidiscrimination considerations must be balanced with the duty to protect patients. Two recent cases were decided in favor of hospitals that removed HIV-infected health care workers from patient care.

A New Jersey court held[6] that a hospital's policy of restricting an HIV-infected surgeon's staff privileges was substantially justified by a reasonable probability of harm to the patient. This case concerned the apparent conflict between an HIV-infected doctor's right under the antidiscrimination laws and the patient's "right to know" under the doctrine of informed consent.

The court held that the hospital's policy of requiring informed consent was reasonable because of the fatal nature of the potential harm. Consequently, the court held that the hospital acted properly in initially suspending the physician's surgical privileges, subsequently imposing a requirement of informed consent, and ultimately barring him from performing surgery.

In considering similar issues, the Fifth Circuit Court of Appeals[2] upheld a Louisiana hospital's discharge of a nurse employee for violating hospital policy by refusing to submit the results of his HIV antibody test. The health care worker was a homosexual who had been exposed to HIV during his eight-year relationship with a hospital patient who had AIDS. (See summary *supra.*)

A US District Court granted partial summary judgment for the defendant hospital in a case involving an HIV-infected surgeon.[7] Several of the surgeon's claims against the hospital were based on the suspension and subsequent reinstatement of his surgical privileges, subject to the condition that patients be informed of his HIV status before he performed an invasive procedure. After obtaining permission from a court under the Pennsylvania Confi-

dentiality of HIV-Related Information Act, the hospital also notified 1,050 of the surgeon's patients of his HIV status. Neither of the actions were found by the court to violate the Rehabilitation Act or the Americans with Disabilities Act. Summary judgment for the hospital was denied, however, for claims based on the surgeon's removal from a panel of providers associated with an occupational health program.

The ninth circuit found that an HIV-infected physician failed to demonstrate that he was "otherwise qualified" to perform preemployment physical examinations.[8] The physician was the director of a facility that had contracted to examine FBI agents. Once the FBI learned of the physician's HIV status, the agency attempted to determine if he posed any significant risks to the agents he examined. The facility refused to confirm the HIV status of the physician and gave what was described by the trial court as "conclusory statements" in response to inquiries made by the FBI. Because the agency made a "genuine attempt" to ascertain whether the physician was qualified to perform physical examinations, no damages were awarded under the Rehabilitation Act for the loss of business suffered by the physician. The appeals court noted that if the action was for injunctive relief, the physician might be successful in demonstrating that he was otherwise qualified for his duties under the contract.

Notifying Patients of an HIV-infected Physician

In a Pennsylvania case,[9] the superior court explored the legal ramifications of notifying a patient who had been exposed to the blood of an HIV-infected physician during an invasive procedure. In this case, Dr. Doe voluntarily submitted to an HIV test after he was cut during an invasive operative procedure. After testing positive, Dr. Doe voluntarily withdrew from participation in further surgical procedures. The issue was whether the trial court abused its discretion in finding that the hospitals sustained their burden of demonstrating a "compelling need" for disclosing Dr. Doe's HIV status. Under Pennsylvania's statute that makes HIV

test results confidential, only a "compelling need" permits disclosure.

Several factors influenced the court, including the infectious nature of the virus, the fact that full-blown AIDS is fatal in all cases, and the recent pronouncements of the American Medical Association and American Dental Association that doctors who test HIV-positive have an ethical obligation to refrain from professional activity that has an identifiable risk of transmission of the infection. It further noted that "[a] hospital, which invites the sick and infirm, impliedly assures its patients that they will receive safe and adequate medical care." The court therefore concluded that the hospital demonstrated a compelling need for disclosure.

The Supreme Court of Pennsylvania affirmed the trial court's decision and the order for limited disclosure of Dr. Doe's identity, stating that the order "reflected due regard for protection of the public health and for avoidance of unwarranted anxiety among patients of the hospitals concerned." As noted above, a court also permitted notification of the patients of an HIV-infected surgeon under the Pennsylvania statute.[7]

Hospital Liability for Occupational Exposure

The CDC reports that at least 40 health care workers have been infected with the AIDS virus through occupational exposure. Most of these were infected by needle punctures, which have a 0.4% chance of resulting in infection. One well-known needle puncture case that resulted in a $1.3 million settlement for the health care worker involved Virginia Prego, a medical school graduate working in a New York City public hospital, who contracted AIDS from a needlestick in 1983.[10] Prego asserted that she had been ordered by her supervising physician to gather up some medical debris containing the needle. She claimed that the supervising physician or some other hospital employee negligently left the needle in the bed clothes, causing her injury. In addition to negligence actions against the hospital, she sued an associate professor of medicine

for violating her right of privacy. Prego sought $175 million in damages.

This case attracted widespread attention because of its potential effect on related lawsuits. Importantly, a previous court decision had determined that Ms. Prego was not an employee subject to the worker's compensation laws. The case was settled for $1.35 million just before jury summations in the case.

A Texas court of appeals has found that the discovery rule applies in HIV cases even if a plaintiff suspects exposure immediately.[11] Thus, the statute of limitations begins to run when the plaintiff knows, or through the exercise of reasonable care and diligence should know, that he or she has contracted the virus. According to the court's decision, a person who suspects exposure cannot reasonably delay testing until symptoms develop, thereby prolonging her or his ability to file suit.

The plaintiff claimed he acquired AIDS when a hospital patient for whom he was caring spewed blood and mucus over his mouth, eyes, and arm. Casarez was a certified nursing assistant with experience in caring for AIDS patients and knew the patient he was attending had AIDS. Casarez brought suit against the patient's physician and the hospital for negligence, and summary judgment was granted in favor of the physician. The court found that a physician fulfills his duty to a hospital's health care workers once he discloses the infectious status of a patient to the proper hospital authorities. Summary judgment in favor of the hospital, however, was denied. The hospital, which pleaded only the statute of limitations argument, faces potential liability for allegedly failing to enforce universal precautions.

The court of claims in New York awarded $5.4 million to a nurse infected with HIV during a struggle with a convict.[12] The court held that the guards, and through them, the State of New York, owed a duty to the nurses struggling with the convict and did not fulfill it. This duty stemmed from state law that provides that the state is responsible for its prisoners, as well as from an agreement the prison had signed with the hospital, stating that control of

inmates in the hospital was the state's responsibility, to be discharged by guards assigned to the prisoners.

On April 2, 1992, an HIV-infected surgeon filed suit in a California Superior Court, claiming that the hospital where he worked failed to enforce the necessary precautionary measures to protect him from acquiring the virus from patients.[13] He also claimed that hospital officials breached his privacy by circulating news of his health status throughout the facility, despite his specific request. In addition, Doe seeks damage for fraudulent concealment, claiming that the hospital should have informed him as to which of his patients were HIV-positive. The physician asserts that the hospital was negligent because it failed to enforce universal precautions adopted by the hospital's parent firm.

Fear of AIDS

In *Faya v. Almaraz*,[14] the Maryland Court of Appeals considered whether (*a*) a surgeon with AIDS has a legal duty to inform his patients of his condition before operating on them; and (*b*) a patient's fear of contracting AIDS from the surgeon is a legally compensable injury if the patient has not tested positive for HIV.

This case involved an oncologic surgeon, Almaraz, who had died of AIDS. On learning of their late physician's illness, two of his patients filed suit, alleging that he acted wrongfully by operating without first telling them that he was HIV-positive or suffering from AIDS. The plaintiffs further alleged that the hospital at which Dr. Almaraz practiced was liable for allowing Dr. Almaraz to operate. The plaintiffs also sought compensation for their fear of contracting AIDS.

The lower court dismissed the plaintiffs' complaints, concluding that they had failed to allege a legally compensable injury. The court found that plaintiffs had failed to sufficiently allege exposure to HIV because they had not alleged that Dr. Almaraz failed to use proper precautions or that any accident occurred during surgery that would have exposed them to HIV. Furthermore, both plaintiffs had tested negative for HIV more than six months after

surgery. The lower court found that plaintiffs' fear that "something that did not happen could have happened" was not an actionable injury.

On appeal, the plaintiffs asserted that duty of care requires an HIV-positive surgeon to disclose his HIV status and the risk of transmission, however minimal, before surgery and that Dr. Almaraz was therefore negligent. The court of appeals agreed, finding that it was foreseeable that Dr. Almaraz might transmit the AIDS virus to his patients during an invasive surgery. The court reasoned that the seriousness of the potential harm, as well as its probability, contributes to a duty to prevent it.

With respect to the question of recovering damages for fear of contracting AIDS, the court reviewed numerous cases in various jurisdictions addressing this issue. Many courts have held that in the absence of facts demonstrating legitimate exposure to the disease-causing agent, there can be no recovery. Other courts have required proof of actual injury (i.e., a positive HIV test), even where the plaintiff demonstrated actual exposure (i.e., a needle stick). In the *Faya v. Almaraz* case, the court could not say that the plaintiffs' fear of acquiring AIDS was unreasonable, even though they had tested negative for HIV and did not identify any actual exposure or avenue of transmission. However, the court held that they could recover for their fear and any physical manifestations of such fear only between the time they learned of Dr. Almaraz's illness and the time they received their negative HIV test results.

The court also held that the trial court had erred in dismissing the plaintiffs' complaints against the hospital, noting that a hospital is liable under agency principles for the negligence of its employees and agents.

Following the California Supreme Court's order to vacate its decision in the case, a California court of appeals affirmed the trial court's award of summary judgment.[15] The case, *Kerins v. Hartley*, is based on the claims of a patient who sought damages for fear of AIDS after learning that her gynecologic surgery had been performed by an HIV-infected surgeon. In its original opinion, the appellate court overturned the trial court's grant of summary

judgment in favor of the estate of the HIV-infected physician and his physician partners, finding that even without a documented exposure, the plaintiff could reasonably claim damages based on her fear of AIDS.

On review, the appellate court was ordered to reconsider its decision in light of *Potter v. Firestone Tire & Rubber Co.*, a toxic-exposure case in which the California Supreme Court established new standards for recovery of mental distress damages. Under the *Potter* standards, plaintiff Kerins could recover damages only if exposure resulted from a negligent breach of duty and her fear of AIDS stemmed from knowledge that, based on reliable scientific opinion, she was more likely than not to develop AIDS from the exposure. Kerins offered no evidence to counter the HIV-infected physician's sworn statement that no exposure occurred during surgery and could only show a remote possibility that she might develop AIDS in the future as a result of the surgery. Accordingly, no recovery for negligent infliction of emotional distress was permitted.

Even under the less-stringent standards established in *Potter* for claims involving fraud or intentional infliction of emotional distress, Kerins's claims were found insufficient. For these types of emotional distress claims, a plaintiff must show that an exposure has "significantly" increased the risk of developing AIDS and resulted in a risk that is "significant." The court subjected Kerins's claim of a technical battery to the "significant risk" standards as well, which effectively vitiated the claim. Applying the policy concerns voiced by the court in *Potter* to *Kerins,* the court commented: "Proliferation of fear of AIDS claims in the absence of meaningful restrictions would run an equal risk of compromising the availability and affordability of medical, dental, and malpractice insurance, medical and dental care, prescription drugs and blood products."

In a similar case, *Brzoska v. Olsen,*[16] a Delaware court has denied recovery to plaintiffs in a fear-of-AIDS case. The action was brought by 38 plaintiffs who had been patients of Raymond P. Owens, an HIV-infected dentist. After Owens's death from AIDS,

the Delaware Division of Public Health notified his patients of their possible exposure to HIV and offered free testing and counseling. Although none of the patients tested positive for HIV, the patients later brought an action against Owens's estate. Their claims included negligence, battery, recklessness, fraudulent misrepresentation, and false pretenses.

Following a review of fear-of-disease cases, the court denied recovery to the plaintiffs because of their failure to show actual exposure to HIV. The court based its ruling on the Delaware Supreme Court decision in the *Mergenthaler* case.[17] *Mergenthaler* involved fear-of-cancer claims brought by a group of women whose husbands worked with asbestos. The women alleged exposure based on contact with asbestos fibers on their husbands' clothing. Their claims were dismissed by the court because the plaintiffs did not assert that they actually inhaled asbestos fibers. The *Brzoska* court found *Mergenthaler* to be the most persuasive authority presented by the parties and granted the defendant's motion for summary judgment.

The Supreme Court of Tennessee also recently refused to permit a fear-of-AIDS claim to proceed to trial because of lack of evidence of an actual exposure to HIV.[18] In *Carroll v. The Sisters of Saint Francis Health Services, Inc.*, the plaintiff, Carroll, received three finger pricks from contaminated needles when she reached into a receptacle for contaminated needles under the mistaken impression that the container held paper towels. Tests for HIV infection over a three-year period after the incident were negative.

Carroll sued the hospital for negligent infliction of emotional distress. The trial court granted summary judgment in favor of the hospital on the emotional distress claim, ruling that the absence of an actual exposure rendered the claim insufficient as a matter of law. The appeals court reversed the trial court's decision and applied a general standard of reasonableness to Carroll's fear. On review, the Tennessee Supreme Court analyzed the physical injury requirement used in other Tennessee fear-of-disease cases. The court found that although the physical injury requirement had been relaxed for emotional distress claims, some type of

objective standard still was the rule. The court formally adopted the "actual exposure" approach and ruled that a plaintiff must prove actual exposure to HIV to recover emotional distress damages for fear of contracting AIDS. If a plaintiff could show actual exposure, damages would be limited to the period between discovery of exposure and receipt of the negative test results that should end the fear of injury.

A Minnesota court of appeals recently reversed a trial court's grant of summary judgment on various claims brought by the patients of an HIV-infected physician.[19] In *K.A.C., et al. v. Benson*, the plaintiffs alleged that the Minnesota Board of Medical Examiners instructed the defendant, an HIV-infected physician, not to perform invasive procedures after he developed suppurating sores on his hands and arms. In contravention of that order, claimed the plaintiffs, the physician continued to perform gynecologic examinations, delivery of babies, and rectal and oral examinations. The plaintiffs argued that the physician's actions created a danger of transmission despite the fact that the physician wore gloves during the invasive procedures. Their claims included intentional and negligent infliction of emotional distress, negligent nondisclosure, and battery.

Unlike the district court, the court of appeals required no showing of direct contact with the physician's body fluids. Citing *Faya v. Almaraz* and *Kerins v. Hartley (vide supra)*, the court of appeals ruled that the HIV-infected physician's performance of invasive procedures was sufficient to raise a fact issue as to whether the patients were placed in a "zone of danger." As support for its ruling, the court cited a letter sent by the physician to his patients informing them of his HIV status. The court declared that the letter contained statements from which a jury could infer admissions of negligence, exposure, and risk of transmission of HIV.

The court concluded as a matter of law, however, that the fear of exposure to HIV is reasonable only between the time the patient learns of the possible exposure and when a negative test result is received. Courts have commonly referred to this time

frame as a "reasonable window of anxiety." The court found that accuracy of the ELISA and Western Blot tests when used in conjunction six months after exposure, rendered continued claims of emotional distress unreasonable as a matter of law. Review in this case has been granted by the Minnesota Supreme Court.

A Los Angeles Superior Court judge reversed a jury verdict and held that a patient does not have a duty to be truthful about his or her medical condition with health care providers.[20] In *Boulais v. Lustig,* a health care worker who was exposed to the patient's blood sued the patient, alleging negligent infliction of emotional distress because the patient failed to disclose that she had AIDS. The jury held the patient negligent and awarded damages of $102,000 on the negligent infliction of emotional distress claim as well as a related claim of fraud. The defendant will appeal, because, notwithstanding his finding that the patient had no duty to disclose, the judge left intact the jury's damages award.

Courts in some jurisdictions have stated in dicta that a patient does have a duty to inform a health care worker of an HIV-positive status.

A Pennsylvania court allowed a prospective class action suit to be brought by patients who were operated on by an HIV-positive resident in obstetrics and gynecology.[21] The suit was based on the plaintiffs' fear of AIDS, and multiple causes of action were alleged, including whether the hospital was negligent in not requiring all health care workers to be tested for HIV, lack of informed consent, claims for intentional infliction of emotional distress, and claims for loss of consortium.

In the initial review of the suit, the court held that the fear of contracting HIV from an obstetrician and gynecologist was not too remote and that the plaintiff stated a cause of action for informed consent, stressing that Pennsylvania adheres to a standard of disclosure of a reasonable patient, not a reasonable doctor. The court dismissed the action based on intentional infliction of emotional distress.

In its second consideration of the case, the judge explained that the claim failed to meet the requirements for class action because

of the varied degrees to which each possible class member was exposed to the HIV-infected resident and because no plaintiff had shown actual infection. The court concluded that under state law, the fear of acquiring a disease alone is not actionable.

In a medical malpractice case, a federal district court in Michigan held that a patient was entitled to $300,000 in damages under Illinois law, because the obstetrician/gynecologist negligently performed a caesarean section that resulted in severe bleeding, hepatitis, and fear of contracting AIDS.[22] The court held that the plaintiff's anxiety that she had contracted AIDS from the transfusions resulted in demonstrable physical symptoms and that these injuries were compensable.

In a New York case involving a prisoner who bit a hospital employee on the hand,[23] the court held that the hospital employee could recover damages for physical injuries suffered, because the state correctional officers were negligent in their slow response to a call for help. Officers at the hospital were charged with knowledge of the patient's mental disturbances and could reasonably have anticipated that the patient might try to harm himself or others.

The court denied the plaintiff's claim for damages for mental anguish based on AIDS phobia, holding that the evidence was too speculative and remote to award damages simply on the basis of a perceived risk and a resulting fear or threat of developing the disease in the future. The court reached this conclusion after noting that the only basis of the plaintiff's fear was the unsubstantiated statement of his attending nurse that the assailant might have AIDS. Moreover, the plaintiff had been tested for the AIDS virus three times and found negative.

In another New York case,[24] a physician sued Suffolk County because the police department failed to inform him that the prisoner/patient on whom he performed surgery was HIV-positive. The issue in the case was whether AIDS phobia constitutes a viable physical injury for the purposes of an action based on negligent infliction of emotional distress. The court noted the New York statutes that made the patient's HIV status confidential

by law and concluded that Suffolk County had no specific duty to disclose the patient's HIV status, and, therefore, defendants were entitled to summary judgment as a matter of law.

In a recent Connecticut case brought by a patient who alleged exposure to the blood of an unknown patient,[25] the trial court granted summary judgment in favor of the hospital and physician defendants. The contact occurred when the patient was positioned on a vinyl-covered stretcher that was, unbeknownst to the hospital, soaked with blood. Some of the blood seeped through the sheet covering the stretcher as well as through the patient's undergarments. Unable to determine the source of the blood, the emergency room physician conducted two rectal examinations of the patient, during which, according to the patient, blood was introduced into the patient's rectum. The patient subsequently filed medical malpractice claims against the hospital and the treating physician.

In support of a motion for summary judgment, the defendants introduced a number of affidavits. The emergency room nurse involved in the plaintiff's care swore that the spot of blood on the sheet covering the stretcher was only the size of a half-dollar. According to the emergency room physician, no blood was transmitted during the rectal examinations. The physician's affidavit was supported by lab tests performed on stool samples obtained during the examinations, which tested negative for occult blood. The hospital's risk manager testified that emergency room records for treatment rendered in the 29 hours before the plaintiff's treatment revealed no patients with a medical history of HIV infection. Finally, the defendants pointed to the negative results of the patient's HIV tests, which had been given periodically over a two and a half year period following the alleged exposure.

Based on the lack of evidence demonstrating exposure to a disease-causing agent and the negative results of his HIV tests, the court found the plaintiff's fear of contracting AIDS to be unreasonable. Unless the plaintiff's anxiety had a reasonable basis, ruled the court, it could not be deemed a compensable injury.

Other Cases

The West Virginia Supreme Court upheld a jury's $1.9 million damage award for emotional distress to a hospital security guard based on the guard's exposure to the virus and his fear of AIDS.[26] While assisting emergency department hospital personnel, the security guard was bitten by a combative patient who was known to be infected by HIV, causing the patient's blood to come in contact with the blood of the security guard.

In finding for the plaintiff, the court distinguished this case from cases where the plaintiff's fear was not reasonable, e.g., where the plaintiff alleged fear of AIDS even though there was no evidence that the person to whose body fluids he was exposed was infected with the HIV virus. In this case, there was clear physical evidence of emotional distress, and there clearly had been an exposure to HIV. Furthermore, the fact that the hospital failed to follow its own rules with regard to warning a person with a need to know about a patient's AIDS status was clearly relevant. In a similar case in Louisiana,[27] a security guard's claim for exposure to an HIV-infected patient's blood was found to be subject to worker's compensation, but his wife's claim was allowed to go forward.

A New York woman (Tischler) who engaged in unprotected sex with a man (Lawson) over a nine-year period sued his estate following his death from AIDS.[28] Tischler's claims were for intentional or negligent infliction of emotional distress caused by the decedent's failure to inform her of his HIV status. The executrix of Lawson's estate filed a motion for summary judgment, asserting that Tischler had suffered no physical injury and that she was prevented from proving the existence of a sexual relationship by New York's Deadman's statute. Tischler tested negative for HIV one year after Lawson's death.

The court denied the motion for summary judgment. The court found that the Deadman's statute would not bar evidence of Tischler's sexual relationship with Lawson while he was alive. Citing cases that allow recovery following actual exposure for the reasonable "window of anxiety" period, the court ruled that

New York law recognizes a duty not to inflict emotional distress, and that whether Lawson's actions resulted in a compensable injury was a question for the jury. As to the period of time for which Tischler's fear of developing AIDS would be compensable, the court ruled that this was also a question for the jury.

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